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New York's Property Clerk Forfeiture Act—Can They Do That?

Shirley W. Whittle*

Drivers arrested in New York City for driving while intoxicated (DWI) can be forced to forfeit their automobiles.¹ Commonly, these drivers respond in disbelief: “Can they do that? Isn’t that unconstitutional?”

New York City’s Property Clerk Forfeiture Act (Forfeiture Act) allows the City of New York (the City) to seize the vehicle of anyone arrested for DWI.² After a hearing, the City can auction the vehicle and even retain the proceeds from the sale.³ The U.S. Supreme Court has long upheld the constitutionality of forfeiture laws such as the City’s, based on the concept of guilty property.⁴ The Court reasons that seizing property prevents further illicit use of the property.⁵ In addition, the Court notes that forfeiture laws deter the illegal use of property and impose economic penalties that render illegal use unprofitable.⁶

Part I of this Recent Development describes Supreme Court decisions upholding the constitutionality of similar forfeiture laws. Part I also examines the use of forfeiture laws by government entities other than New York City. Finally, Part I focuses on the New York City Forfeiture Act and explores the following issues: how the City

* J.D., Washington University School of Law, 2000.

1. See N.Y. CITY ADMINISTRATIVE CODE § 14-140(b) (1999).

2. *Id.* The Forfeiture Act states that “all property . . . suspected of having been used as a means of committing crime or employed in aid or furtherance of crime . . . [and] all property . . . taken from . . . a person appearing to be . . . intoxicated . . . shall be given, as soon as practicable, into the custody of and kept by the property clerk.” *Id.* See also *Grinberg v. Safir*, 698 N.Y.S.2d 218, 219 (N.Y. App. Div. 1999) (holding that it is the City’s prerogative to seize vehicles of intoxicated drivers because such seizures are authorized by statute).

3. *Grinberg v. Safir*, 694 N.Y.S.2d 316, 320 (N.Y. Sup. Ct. 1999), *aff’d*, 698 N.Y.S.2d 218 (N.Y. App. Div. 1999).

4. *United States v. Ursery*, 518 U.S. 267, 275 (1996).

5. *Id.* at 290 (citing *Bennis v. Michigan*, 516 U.S. 442, 452 (1996)).

6. *Id.* (citing *Bennis*, 516 U.S. at 452).

established the Forfeiture Act, what the Mayor of the City hopes to accomplish with the Forfeiture Act, and whether the Forfeiture Act has been successful.

Part II examines *Grinberg v. Safir*,⁷ the first case to scrutinize the constitutionality of New York's Forfeiture Act. Part III analyzes the likelihood of the U.S. Supreme Court holding that the Forfeiture Act violates the Due Process Clause, Takings Clause, or Excessive Fines Clause. Finally, this Recent Development concludes that the Forfeiture Act should survive judicial scrutiny because it does not violate the U.S. Constitution and is consistent with the public policy behind forfeiture.

I. BACKGROUND

A. The Supreme Court Traditionally Upholds the Constitutionality of Forfeiture Laws

In *Bennis v. Michigan*⁸ the Supreme Court considered whether Michigan could constitutionally seize an automobile that had been used to solicit prostitution. The defendants were the married co-owners of the automobile, which the husband used to solicit a prostitute.⁹ Michigan has a statutory abatement scheme that allows the state to seize an automobile by declaring it a public nuisance.¹⁰ The statutory scheme does not provide compensation to co-owners, even if the co-owner had no knowledge of the illegal activity.¹¹ After the husband was convicted of gross indecency, Michigan sued both the husband and the wife to have the vehicle declared a public nuisance and abated under Michigan's forfeiture law.¹² The wife contended that the forfeiture of the vehicle violated her due process

7. *Grinberg*, 698 N.Y.S.2d 218.

8. *Bennis*, 516 U.S. 442.

9. *Id.* at 443.

10. *Id.* at 445.

11. *Id.* at 443-44. See MICH. COMP. LAWS ANN. § 750.3386 (West 1995); MICH. COMP. LAWS § 600.3825 (1979). These statutes provide that if an individual uses his automobile for illegal purposes, such as prostitution, these activities will be declared a nuisance and, as such, an order of abatement shall be entered as part of the judgment in the case. *Bennis*, 516 U.S. at 443 nn.1 & 2.

12. *Bennis*, 516 U.S. at 443-44.

rights because she did not know that her husband would use the vehicle to violate Michigan's indecency law.¹³ The Supreme Court rejected this argument, stating that there is a "long and unbroken line of cases" holding that a co-owner's interest in property may be forfeited based on illegal use of the property, even if the co-owner did not know the property would be put to such use.¹⁴ The Court further noted that the state is not required to establish that the automobile's principal use was illegal.¹⁵

The wife also argued that the vehicle's forfeiture constituted a violation of the Takings Clause.¹⁶ The Court rejected this argument. The Court explained that the government is not required to compensate a property owner for property the government lawfully acquires under the exercise of governmental authority, unless the government acquires the property through eminent domain.¹⁷ Therefore, the Court held that Michigan was free to seize the defendants' vehicle and that the wife was not entitled to compensation for her property interest in the vehicle. The Court

13. *Id.* at 446.

14. *Id.* The long line of unbroken cases begins with *The Palmyra*, 25 U.S. 1 (1827). *Palmyra*, a vessel commissioned by the King of Spain, attacked a U.S. vessel. A U.S. warship captured the vessel and brought it to South Carolina for trial. *Id.* at 2. Spain argued that the vessel could not be forfeited until the owner was convicted for privateering. *Id.* at 9. Justice Story rejected this argument and held that "the offen[s]e is attached primarily to the thing . . ." *Id.* at 24. The line of cases continues seventeen years later, when Justice Story concluded that the acts of the master and crew bind the interest of the owner of the ship, regardless of whether the owner is guilty or innocent. *Harmony v. United States*, 43 U.S. 210 (1844). Justice Story held that the owner impliedly submits to whatever the law denounces as a forfeiture and attaches to the ship because of the crew's unlawful acts. *Id.* The line of cases continues with *Dobbins's Distillery v. United States*, 96 U.S. 395, 401 (1878), in which the Court upheld the forfeiture of property used by a lessee to fraudulently avoid federal alcohol taxes.

The *Bennis* Court, quoting *Dobbins's Distillery*, reasoned that "it has always been held . . . that the acts of [the possessors] bind the interest of the owner . . . whether he be innocent or guilty." 516 U.S. at 447. Next, the Court cited *Van Oster v. Kan.*, 272 U.S. 465 (1926), which allowed the forfeiture of a purchaser's interest in a vehicle because the seller had previously misused it. The *Bennis* Court stated that "[i]t is not unknown or indeed uncommon for the law to visit upon the owner of property the unpleasant consequences of the unauthorized action of one to whom he has entrusted it." 516 U.S. at 448. The *Bennis* Court also cited *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921), and *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), as additional support. 516 U.S. at 448-49.

15. *Bennis*, 516 U.S. at 450.

16. *Id.* at 452. The Fourteenth Amendment made the Fifth Amendment applicable to the states. See *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

17. *Bennis*, 516 U.S. at 452.

reasoned that Michigan's forfeiture law deters illegal activities that contribute to neighborhood deterioration and unsafe streets.¹⁸ The Court also noted that the long-standing precedent authorizing such forfeiture actions is "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."¹⁹

Just three months later, the Supreme Court revisited the issue of forfeiture in *United States v. Ursery*.²⁰ In *Ursery*, the United States instituted civil forfeiture proceedings to seize the defendant's house, alleging that the defendant used the property to facilitate the unlawful production and distribution of a controlled substance.²¹ The defendant argued that the forfeiture violated the Double Jeopardy Clause.²² The Court rejected this argument citing *Various Items of Personal Property v. United States*, where the Court previously held that the Double Jeopardy Clause does not apply to civil forfeiture actions.²³ In *Various Items*, the Court stated that because forfeiture proceedings are against the property and not the owner, the Fifth Amendment does not apply.²⁴

In *Ursery*, the Court adopted a two-part test established in an earlier case to determine whether the forfeiture sanction was intended as punishment, and thereby characterized as essentially criminal rather than civil.²⁵ The Court explained that the Double Jeopardy

18. *Id.* at 453.

19. *Id.* (quoting *Goldsmith-Grant*, 254 U.S. at 511).

20. 518 U.S. 267 (1996).

21. *Id.* at 271. Michigan police found marijuana growing adjacent to Ursery's house and found marijuana seeds, stems, stalks, and a grow light within the house. *Id.* Ursery was indicted for manufacturing marijuana, in violation of 21 U.S.C. § 841(a)(1). *Id.* at 271. A jury found him guilty of violating the statute and he was sentenced to sixty-three months in prison. *Id.*

22. *Ursery*, 518 U.S. at 271. The Double Jeopardy Clause provides: "Nor shall any person be subject for the same offen[s]e to be twice put in jeopardy of life or limb . . ." U.S. CONST. amend. V. The Double Jeopardy Clause prevents "both successive punishments and . . . successive prosecutions." *Ursery*, 518 U.S. at 273 (quoting *United States v. Dixon*, 509 U.S. 688, 696 (1993)). "The protection against multiple punishments prohibits the Government from 'punishing twice, or attempting a second time to punish criminally for the same offense.'" *Id.* at 271 (citing *Witte v. United States*, 515 U.S. 389, 396 (1995), and quoting *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938)).

23. *Ursery*, 518 U.S. at 274 (citing *Various Items of Personal Property v. United States*, 282 U.S. 577 (1931)).

24. *Id.* at 275 (citing *Various Items*, 282 U.S. at 581).

25. *Id.* at 276-78 (citing *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984)).

Clause applies only if the sanction is deemed criminal in character.²⁶ The first prong of the test requires the Court to determine whether Congress intended the statutory forfeiture as a remedial civil sanction.²⁷ Under the second prong, the Court must consider whether the statutory scheme is so punitive, either in purpose or effect, that it negates Congress's intent to establish a civil remedial mechanism.²⁸ In *Ursery*, the Court determined that the forfeiture of the house was civil in nature because, under the first prong of the test, the statutory mechanisms established to enforce such forfeitures demonstrated Congress's intent that the forfeitures be a civil sanction.²⁹ The Court concluded that "Congress specifically structured these forfeitures to be impersonal by targeting the property itself."³⁰ The Court also observed that the statute created distinctly civil procedures, further indicating Congress's intent.³¹ The Court then turned to the second prong and stated that it found little evidence to suggest, regardless of Congress's intent, that the forfeiture statutes were "so punitive in form and effect" that they were essentially criminal sanctions.³² The Court further noted that while the statutes may have certain punitive aspects, they also serve important nonpunitive goals.³³ For example, the state's ability to seize property that is used in drug-related offenses "encourages property owners to take care in managing their property and ensures that they will not permit their property to be used for illegal purposes."³⁴ The Court also noted that forfeiture may abate a nuisance and serve "the additional nonpunitive goal of ensuring that [property owners] do not profit from their illegal acts."³⁵ As such, the Court held that "in rem civil forfeitures" are neither punitive nor criminal sanctions, and therefore, do not violate

26. *Id.* at 277.

27. *Id.* at 277-78.

28. *Ursery*, 518 U.S. at 277-78.

29. *Id.* at 288-89.

30. *Id.* at 289.

31. *Id.* at 289. "In sum, 'by creating such distinctly civil procedures for forfeiture under §§ 881 and 981, Congress has indicated clearly that it intended a civil, not criminal sanction.'" *Id.* (quoting 89 *Firearms*, 465 U.S. at 363) (alteration in original) (internal citation omitted).

32. *Ursery*, 518 U.S. at 290.

33. *Id.*

34. *Id.* (citing *Bennis*, 516 U.S. at 452).

35. *Id.* at 290-91. *See also Bennis*, 516 U.S. at 452 (condoning abatement of a car as a nuisance and claiming forfeiture helps prevent further illegal use of property).

the Double Jeopardy Clause.³⁶ Thus, the forfeiture of the defendant's house was constitutional.³⁷

B. Other Government Entities Have Implemented Forfeiture Laws

Like New York City, government entities increasingly adopt forfeiture laws to deter criminal activity. Federal and state laws, as well as municipal codes, frequently provide for seizure of private property by the government to deter violations of certain statutes.³⁸ In particular, forfeiture laws target offenses which involve narcotics, gambling devices, or untaxed liquor.³⁹ These statutes provide for the forfeiture of unlawful property and property used in association with the unlawful property or transaction, such as vehicles used to move contraband or money that is closely connected to contraband.⁴⁰ In general, whether a court allows or denies the forfeiture depends on the facts of the case and the soundness of the evidence connecting the money to the contraband.⁴¹ Many opponents of forfeiture laws argue that the laws violate due process; however, the Supreme Court held otherwise and government entities are eager to put these laws to work.

In Florida, state legislators are studying a proposal that would make Florida the next state to grant local municipalities the power to seize the vehicles of habitual drunk drivers.⁴² Under the proposal, if police officers stop a driver with a suspended or revoked license due to a prior conviction for driving under the influence (DUI), the officers can seize the vehicle if they suspect the driver is currently driving under the influence.⁴³ The local government then can sell the

36. *Ursery*, 518 U.S. at 292.

37. *Id.*

38. John E. Theuman, Annotation, *Forfeiture of Money to State or Local Authorities Based on its Association With or Proximity to Other Contraband*, 38 A.L.R. 4th 496 (1985).

39. *Id.*

40. *Id.*

41. *Id.*

42. Greg Retsinas, *DUI Vehicles Could be Taken if Law OK'd Under the Proposed Legislation, Cars Seized From Repeat Offenders Could be Sold at Auction*, SARASOTA HERALD-TRIB., Mar. 4, 1999, at 1A. There are currently twenty-three states that allow this practice. *See id.*

43. *Id.*

vehicle at an auction.⁴⁴ Proponents of Florida's proposed forfeiture law contend that the law serves as an additional deterrent to drunk driving.⁴⁵ Moreover, proponents cite a study which indicates that states with vehicle seizure laws saw their rate of DUI recidivism drop from 50% to 4%.⁴⁶ On the other hand, civil rights advocates criticize the bill, calling it an abuse of government forfeiture powers.⁴⁷ They argue that Florida's proposed forfeiture act unfairly forces individuals to go to civil court to retrieve their seized property, even when no criminal charges are filed.⁴⁸ Notably, Florida's proposed law allows judges some leeway when a spouse or relative is unfairly burdened by the forfeiture.⁴⁹

In Chicago a vehicle is subject to seizure if police officers arrest the driver for DUI and revoke or suspend his driver's license due to a previous DUI or other prior offense.⁵⁰ Chicago drivers with two or more DUI convictions must equip their vehicles with an "ignition-interlock" system.⁵¹ Chicago currently permits police officers to seize a vehicle if, when they stop the vehicle, they find narcotics or weapons or if the vehicle was used to solicit prostitution.⁵² Unless police officers decide that the government can keep the vehicle on other state or federal forfeiture grounds, the vehicle's owner may request a hearing within twenty-four hours of the incident.⁵³ If the hearing officer finds by a preponderance of the evidence that an offense in fact occurred, the owner may retrieve the vehicle after "paying a \$500 fine, a \$115 towing fee, and any daily storage fees."⁵⁴ If the owner is subsequently convicted of the related offense he can keep his vehicle, but he automatically forfeits the fine, as well as the towing and storage fees.⁵⁵

44. *Id.*

45. *Id.*

46. *Id.*

47. Retsinas, *supra* note 42.

48. *Id.*

49. *Id.*

50. Flynn McRoberts, *DUI Case Forfeitures is an Idea on the Roll; Momentum Building for Seizing Vehicles*, CHI. TRIB., Mar. 21, 1999, at 1.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. McRoberts, *supra* note 50.

C. New York City has Enacted the Property Clerk Forfeiture Act

New York City's Forfeiture Act took effect in February 1999. The City implemented the Forfeiture Act to combat excessive drunk driving, in conjunction with New York Mayor Rudolph Giuliani's desire to implement a zero-tolerance policy for DWI offenses.⁵⁶ Under the Forfeiture Act, the City can seize a vehicle if the driver has a blood-alcohol level of .10% or higher, regardless of whether the driver has prior DWI convictions.⁵⁷ The City then can tow the vehicle to a city lot and hold it until the driver is convicted and the City can sell the car at auction.⁵⁸ Even if the driver is acquitted, he still may be required to prove in civil court that his vehicle should be returned.⁵⁹ Discussing the effectiveness of the Forfeiture Act, Mayor Giuliani stated that from the inception of the program on February 22, 1999 until March 25, 1999, New York City police officers arrested 342 people for driving while intoxicated and seized 164 vehicles.⁶⁰ Mayor Giuliani added that, of the 178 vehicles that were not seized, "149 belonged to individuals other than the accused driver, 12 were leased cars, 6 were rental cars, and 11 were marked as evidence for other crimes, such as car theft."⁶¹ Mayor Giuliani also noted that accidents

56. K.C. Boey, *Howard Gives Top Priority for Drugs Issue*, THE NEW STRAITS TIMES, Mar. 3, 1999, at 10. Mothers Against Drunk Driving's (MADD) National President praised the forfeiture initiative launched by Mayor Giuliani. Bill Farrell, *Police Targets DWIs/Head of MADD Hails New City Crack Down*, N.Y. DAILY NEWS, Sept. 3, 1999, at 1.

57. Richard Wolf, *NYC Car-Seizure Law Draws Imitators but Civil Libertarians Focus Attention on its Legality*, USA TODAY, Mar. 11, 1999, at A3.

58. *Id.* Traditionally, a driver arrested for a first-time DWI offense is allowed to plead guilty to a charge of driving while ability impaired (DWAI), a non-criminal offense. Sean Gardiner, *Will DWI Policy Seize the Courts?/Giuliani Plan May Spur Jam*, NEWSDAY (New York), Mar. 15, 1999, at A7. "The fines for . . . DWAI are \$300 to \$500 and up to 15 days in jail, compared to a \$500 to \$1,000 fine and punishment of up to a year in jail for DWI." *Id.*

59. Wolf, *supra* note 57. The burden of proof for forfeiture is lower than the burden of proof needed for a DUI conviction. Therefore, a driver could potentially be acquitted of a DUI charge, but still lose his automobile to forfeiture. Chris Heidenrich & Tony Gordon, *DUI Suspects Stand to Lose More Than Licenses: Repeat Offenders May Find Their Cars Seized*, CHI. DAILY HERALD, Mar. 28, 1999, at 1.

60. David M. Herszenhorn, *Giuliani Says Crackdown on Drunken Drivers Cuts Accidents*, N.Y. TIMES, Mar. 31, 1999, at B2 (citing figures from police department statistics).

61. *Id.* Since the Forfeiture Act took effect on February 22, 1999, 164 vehicles have been confiscated. Douglas Feiden, *DWI Accidents Dip 39% Rudy Sez His Policy Saves Lives*, N.Y. DAILY NEWS, Mar. 31, 1999, at 8. Fifty-four of these vehicles were involved in accidents. *Id.* The average breathalyzer reading was .17%, with .1% being the lowest reading and .34% being

involving drunk drivers, DWI arrests, and vehicular fatalities declined in the time the program was in force.⁶²

II. STATEMENT OF THE CASE: THE CONSTITUTIONALITY OF NEW YORK CITY'S PROPERTY CLERK FORFEITURE ACT IS CHALLENGED

Less than two days after the City's Forfeiture Act took effect, City police officers arrested Pavel Grinberg for DWI and seized his car.⁶³ After police refused his attorney's demand that the vehicle be returned, Grinberg brought an action seeking the return of his car and the invalidation of the Forfeiture Act.⁶⁴ The New York Supreme Court held that Grinberg failed to demonstrate that the Forfeiture Act is "unconstitutional, contrary to law or arbitrary and capricious, either on its face or as applied to him."⁶⁵ As such, the court dismissed Grinberg's constitutional challenge.⁶⁶

The *Grinberg* court rejected the argument that the Forfeiture Act

the highest reading. *Id.* Of first-time DWI offenders, 103 were involved in accidents and seven repeat offenders were involved in accidents. *Id.*

62. Herszenhorn, *supra* note 60. Mayor Giuliani also said, "the number of accidents caused by [drunk] driving had declined to 110 from 179 in the same period [the previous] year." *Id.* This shows a decline of nearly 39%. DWI arrests fell approximately 25% during the same period. *Id.* During the period from February 22 to May 30, fatalities were down 37.5% from the same period the previous year, from eight deaths to five. *Id.*

63. *Grinberg*, 694 N.Y.S.2d at 319-20. Grinberg, a 28-year-old maintenance man, told police he had consumed one beer three hours prior to his arrest. Salvatore Arena & Frank Lombardi, *Seizing Cars is Legal Move, Judge Rules*, N.Y. DAILY NEWS, May 20, 1999 at 5. "The arresting officer concluded that petitioner was intoxicated based on the strong smell of alcohol, watery and bloodshot eyes, and coordination tests." *Grinberg*, 694 N.Y.S.2d at 320. Also, a breathalyzer test revealed that the petitioner had a blood alcohol level of .11%. *Id.* New York's legal threshold for breathalyzer tests is .10%. *Id.*

64. *Grinberg*, 694 N.Y.S.2d at 320. The challenge was actually filed by the New York Civil Liberties Union on Pavel Grinberg's behalf. Graham Rayman, *Judge Approves DWI Car Seizure*, NEWSDAY (New York), May 20, 1999, at A7. Grinberg was the second person arrested on a charge of DWI under the Forfeiture Act. *Id.* "The first driver arrested, Francisco Almonte of Corona, was sentenced . . . to [one] to [three] years in jail and had his driver's license revoked after pleading guilty." *Id.* "The Grinberg-NYCLU court papers alleged that the city acted without legal basis, that Grinberg's car was not evidence in a crime, that he was denied due process, and that taking his car was an unreasonable seizure in violation of the state and federal constitutions." *Id.* Grinberg appeared on television after the arrest saying that "the loss of his car prevented him and his wife from getting to work or anywhere else conveniently." *Id.* The property clerk filed a separate action against the petitioner "for a judgment declaring the vehicle forfeited as the instrumentality of [DWI]." *Grinberg*, 694 N.Y.S.2d at 320.

65. *Grinberg*, 694 N.Y.S.2d at 328.

66. *Id.*

was preempted by another state law.⁶⁷ The court reasoned that nothing in the Forfeiture Act's legislative history indicated that the New York legislature intended to occupy the field.⁶⁸ Therefore, the availability of other rights and remedies was preserved as long as the new law did not violate overriding state policy.⁶⁹ Because the Forfeiture Act implemented current law, the court noted that it did not need additional legislative authorization.⁷⁰

The court also rejected Grinberg's argument that the forfeiture was criminal rather than civil because the City brought the forfeiture action against Grinberg instead of his vehicle.⁷¹ The court reasoned that "[t]he nature and purpose of the remedy sought is significant, not the form of the action or the method of obtaining jurisdiction."⁷² Therefore, the court found that "[t]he City's forfeiture action appropriately seeks a declaratory judgment. . . requiring a plenary action against an individual and personal service."⁷³ The City sought no relief other than a declaration of rights in the vehicle; thus, the

67. *Id.* at 320-21.

68. *Id.* at 321.

69. *Id.*

70. *Grinberg*, 694 N.Y.S.2d at 321.

71. *Id.* The court also rejected petitioner's argument that the "City unconstitutionally violated the separation of powers by imposing an additional DWI sentence, beyond that authorized by state law." *Id.* The court stated that "[n]o case has deemed forfeiture a criminal sentence if sought in a separate civil action. Cases under the City's forfeiture law have been sustained irrespective of the status of the related criminal cases." *Id.* Therefore, the court held that separation of powers is not violated. In addition, the court rejected the petitioner's argument that, under the federal constitution, forfeiture constitutes punishment and is therefore a violation of law. *Id.* The court stated that the U.S. Supreme Court, in *Austin v. United States*, 509 U.S. 602 (1997), did not hold that "forfeiture constitute[s] a sentence or punishment for double jeopardy or separation of powers analysis." *Grinberg*, 694 N.Y.S.2d at 321. Therefore, the court found the petitioner's argument unpersuasive. *Id.* at 321-22.

72. *Grinberg*, 694 N.Y.S.2d at 322 (citing *Ursery*, 518 U.S. 267). "Civil forfeiture actions for instrumentalities traditionally were brought in rem against the 'guilty' property." *Id.* at 321 (citing *The Palmyra*, 25 U.S. at 14 and *United States v. James Daniel Good Real Property*, 510 U.S. at 57-58). Jurisdiction was obtained by seizure, attachment, or lien because the absent or unknown owners of the property could not be personally served." *Id.* In personam jurisdiction was not needed because "the litigation sought only the property, not a money judgment." *Id.* "In contrast, collection of fines, assessments, and penalties need fully exportable money judgments entitled to full faith and credit, requiring in personam jurisdiction. In personam civil proceedings to collect fines, assessment and penalties from a criminal defendant has been held punitive for double jeopardy analysis." *Id.* at 321-22.

73. *Grinberg*, 694 N.Y.S.2d at 322.

action was civil, not criminal.⁷⁴

Moreover, the court rejected Grinberg's argument that the taking and retention of his vehicle was an unreasonable seizure under the U.S. Constitution.⁷⁵ The court held that "the seizure was reasonable under the theories of plain view, incident to arrest, and the automobile exception."⁷⁶ Under the plain view exception, warrantless seizures are permissible when "contraband, instrumentalities, or evidence is found where it is immediately apparent to police officers."⁷⁷ In *Grinberg*, the court observed that "[i]t was immediately apparent during the stop that the car was the . . . instrumentality [to the DWI] subjecting it to seizure."⁷⁸ Under the incident to lawful arrest exception, police officers are allowed to search the area within the driver's control for instrumentalities without a warrant.⁷⁹ In this case, because the police observed Grinberg driving the vehicle and then arrested him for intoxication, Grinberg could not reassume control of the vehicle.⁸⁰ Given the vehicle's status as an instrumentality, only the police had the right to possess the vehicle.⁸¹ Finally, under the automobile exception, police are permitted "to stop and search a vehicle if they have probable cause that it contains contraband, instrumentalities, or evidence of a crime."⁸² As such, the police can seize a vehicle that is an instrumentality of a crime.⁸³

74. *Id.*

75. *Id.* Petitioner argued that the seizure was illegal because the police seized his vehicle without cause or a warrant, which is required by the Fourth Amendment. *Id.* (citing U.S. CONST. amend. IV).

76. *Id.*

77. *Id.* (citing *Horton v. California*, 496 U.S. 128 (1990)). "'Immediately apparent' does not mean at first glance, but before conclusion of the officer's on-scene inquiry." *Id.* (citing *People v. Marinelli*, 458 N.Y.S.2d 785 (N.Y. Sup. Ct. 1982)). The police observed Grinberg driving on public streets. After concluding that Grinberg was intoxicated, the police had probable cause to believe that Grinberg committed the DWI. *Id.* The breathalyzer test supported this finding. *Id.*

78. *Grinberg*, 694 N.Y.S.2d at 322.

79. *Id.* at 323. These searches are allowed because they are minimally intrusive, spatially limited, and contemporaneous. *Id.* Furthermore, they do not encroach on an arrestee's privacy significantly more than the arrest. *Id.* Retention of a vehicle is necessary because they are highly mobile, secretable, and transferable. *Id.*

80. *Id.*

81. *Id.*

82. *Grinberg*, 694 N.Y.S.2d at 323.

83. *Id.*

Because *Grinberg* used the vehicle to commit DWI, it was an instrumentality to that DWI and was lawfully seized. Therefore, the court held that the warrantless seizure and retention of Grinberg's vehicle was constitutional under the theories of plain view, incident to lawful arrest, and the automobile exception.⁸⁴

In addition, Grinberg argued that the Forfeiture Act violates the Due Process Clause of the U.S. Constitution because it authorizes the police to take and retain a vehicle without a hearing.⁸⁵ The court rejected this argument, stating that "immediate seizure of a drunk driver's automobile upon arrest is necessary because the arrestee is legally and physically incapable of driving."⁸⁶ The court further reasoned that because a vehicle is easily moved or concealed, advance warning of confiscation could prevent police from effecting forfeiture.⁸⁷ The court also stated that the "City's interest in deterring drunk driving and ensuring enforceability of a subsequent forfeiture order clearly outweighed the private interest affected" by the law.⁸⁸

Finally, Grinberg challenged the Forfeiture Act on the ground that forfeiture constitutes an excessive fine, and thus violates the Eighth Amendment.⁸⁹ The court held that while forfeiture may be a "fine," the forfeiture in the instant case was not excessive for the following reasons: (1) Grinberg's vehicle was the instrumentality of a crime, inseparable from the crime, and its prerequisite; (2) DWI is a serious crime in its sentence and effect; and (3) although Grinberg estimated

84. *Id.*

85. *Grinberg*, 694 N.Y.S.2d at 323. The petitioner relied on the Fourteenth Amendment for this argument. U.S. CONST. amend. XIV. The Due Process Clause of the Fourteenth Amendment states that the government must give an individual notice and a fair opportunity to be heard before the government can deprive the person of his property. *Grinberg*, 694 N.Y.S.2d at 324.

86. *Grinberg*, 694 N.Y.S.2d at 325. The law does not require police to turn a vehicle over to someone who could cause an accident or who might fail to return it. *Id.* at 43 n.10.

87. *Id.* The court further stated that the risk of erroneous deprivation is minimized because the arresting officers are government employees who receive no economic benefit from the seizure. *Id.* The court also reasoned that "[t]he seizure is simultaneous with a DWI arrest for which the police must have probable cause. The arresting officer evaluates an offense committed in his or her presence. Indicia of alcohol consumption and objective tests confirming the presence of alcohol minimize the risk of erroneous deprivation." *Id.*

88. *Id.*

89. *Grinberg*, 694 N.Y.S.2d at 326. "If a civil forfeiture contains a punitive element, it is deemed a fine under the Eighth Amendment despite its remedial purpose, and must be analyzed for excessiveness." *Id.* at 327.

the value of his vehicle at \$2,000, the vehicle's retention and forfeiture was "not unreasonably harsh as a matter of law."⁹⁰ Therefore, the court held that the forfeiture did not violate the Eighth Amendment.⁹¹ New York's Forfeiture Act survived constitutional challenge.⁹²

III. ANALYSIS: THE UNITED STATES SUPREME COURT SHOULD UPHOLD THE CONSTITUTIONALITY OF THE FORFEITURE ACT

A. *The Due Process Clause*

In order for the Supreme Court to hold that a forfeiture does not violate the Due Process Clause, the government must show that the property owner had notice and an opportunity to contest the abatement of the vehicle.⁹³ However, for a due process inquiry, precedent does not require that the Court determine whether the use for which the property was forfeited is the principle use of the property.⁹⁴

New York's Forfeiture Act requires the property clerk to bring a forfeiture claim within twenty-five days of the property owner's demand for release of his vehicle.⁹⁵ This requirement gives the property owner notice that a forfeiture action has been commenced

90. *Id.* at 327-28. The court analyzed the petitioner's argument pursuant to the following three tests advanced for measuring excessiveness: proportionality, instrumentality, and a mixed instrumentality-proportionality analysis. *Id.* at 327. Under the instrumentality test, the petitioner was driving his vehicle at the time of the incident: "The owner's role and his use of the property are temporally and spatially coextensive with the offense charged." *Id.* Under the proportionality test, DWI is a serious crime that injures and kills. The threat posed by drunk drivers is irrefutable. *Id.* Finally, under the mixed instrumentality-proportionality test, the severity of the offense and its societal impact are high compared to the petitioner and the co-owner's inconvenience. Therefore, the vehicle's retention and forfeiture was not unreasonably harsh. *Id.* at 328. "Given the severity of the available sentence [a fine of \$1,000 and three years probation, or a combination, plus loss of driving privileges], forfeiture of a used car valued at twice the maximum fine is not grossly disproportionate. Neither is this instrumentality forfeiture greater in relation to the offense than others sustained." *Id.*

91. *Grinberg*, 694 N.Y.S.2d at 328.

92. *Id.* This decision was later affirmed by the Appellate Division of the New York Supreme Court. *See Grinberg v. Safir*, 698 N.Y.S.2d 218 (N.Y. App. Div. 1999).

93. *Bennis*, 516 U.S. at 446. The Due Process Clause is found in the Fourteenth Amendment. U.S. CONST. amend. XIV.

94. *Bennis*, 516 U.S. at 450.

95. *Grinberg*, 694 N.Y.S.2d at 326 n.13.

against his vehicle and allows the petitioner an opportunity to defend against the action in court. Therefore, the Forfeiture Act conforms with the Due Process Clause.⁹⁶ In addition, Grinberg's argument that confiscation of a vehicle before the owner has been convicted of a crime violates substantive due process is misplaced. As the *Grinberg* court persuasively noted: "the City's interest in deterring drunk driving and ensuring enforceability of a subsequent forfeiture order clearly outweighs the private interest affected."⁹⁷

B. The Takings Clause

Co-owners of forfeited property argue that forfeiture statutes violate the Takings Clause because the statutes do not require prosecutors to separate the rights or interests of the co-owner that committed the illegal act from those of the innocent co-owner.⁹⁸ Courts reject this argument, relying on seventy-five years of precedence holding that such statutes are constitutional under punitive and remedial jurisprudence.⁹⁹ Courts consistently hold that whether the seized vehicle has a co-owner is irrelevant, even if the co-owner has no knowledge of the illegal activity.¹⁰⁰ Therefore, the New York Forfeiture Act is consistent with similar forfeiture laws held to be constitutional.¹⁰¹

96. In *Grinberg*, the court looked at several factors to determine whether the delay between a seizure and the initiation of judicial proceedings violated due process based on the petitioner's right to a speedy trial. *Id.* at 325. The court considered factors such as length of delay, reason for the delay, the petitioner's assertion of his right, and prejudice to the petitioner. *Id.* The petitioner's case in *Grinberg* was heard within eighteen days of the seizure. *Id.* at 326 n.13. Therefore, the court found that the hearing was not subject to delay and was within due process rights. *Id.* at 326.

97. *Id.* at 325. The court further explained that requiring a pre-seizure hearing would be impractical if it was required as part of the arrest or arraignment. *Id.* Returning the vehicle to its owner would prevent the City from beginning a forfeiture action because the Forfeiture Act applies only to items in the property clerk's possession. *Id.* at 325 n.11. *See supra* text accompanying note 92.

98. *Bennis*, 516 U.S. at 449, 452.

99. *Id.* at 453.

100. *Id.* at 452-53.

101. *See, e.g., supra* notes 18-19. The *Bennis* court stated that these policy reasons were consistent with the long-standing precedent upholding the constitutionality of forfeiture laws. *Bennis*, 516 U.S. at 453.

C. The Excessive Fines Clause

Opponents of the Forfeiture Act contend that it is unfair for the City to retain the proceeds from the sale of forfeited vehicles because the value of the vehicle is often greater than the probable fine.¹⁰² Therefore, opponents argue that the Forfeiture Act violates the Excessive Fines Clause.¹⁰³ Courts hold that if the forfeiture of property amounts to a punishment, the forfeiture will be subject to the limitations of the Excessive Fines Clause.¹⁰⁴

The *Grinberg* court found that the Forfeiture Act was punitive in nature.¹⁰⁵ The court then analyzed the fine for excessiveness and held the fine was not “grossly disproportionate.”¹⁰⁶ The court’s analysis is questionable considering the fact that *Grinberg*’s car was valued at twice the maximum fine.¹⁰⁷ Furthermore, the court’s opinion is incomplete because it failed to define the term “grossly disproportionate.” Nevertheless, the Forfeiture Act itself is not likely to be defeated under the Excessive Fines Clause if the forfeiture involved was reasonable.¹⁰⁸

IV. CONCLUSION

Courts uphold forfeiture laws under the U.S. Constitution. The use of these laws has increased and neither Congress nor the Supreme

102. See Alan Finder, *Drive Drunk, Lose the Car? Principle Faces a Test*, N.Y. TIMES, Feb. 24, 1999, at B1.

103. The Excessive Fines Clause is part of the Eighth Amendment. U.S. CONST. amend VIII.

104. *Ursery*, 518 U.S. at 281. The *Ursery* Court reviewed the history of civil forfeiture in the United States and in England to determine whether a civil penalty constitutes punishment. *Id.* The Court then concluded that the statute in that particular case constituted “payment to a sovereign as punishment for some offense.” *Id.* Therefore, the forfeiture statute in *Ursery* was subject to the limitations of the Excessive Fines Clause. *Id.*

105. *Grinberg*, 694 N.Y.S.2d at 327.

106. *Id.* The court stated that, despite a civil forfeiture’s remedial purpose, “if the civil forfeiture contains a punitive element, it is deemed a fine . . . and must be analyzed for excessiveness.” *Id.* The *Grinberg* court also noted that the Supreme Court found a civil forfeiture to be punitive even though the forfeiture “[had] an ‘escape hatch’ for innocent owners[.] link[ed] the forfeited property directly to the crime [and lacked] specific correlation between the property’s value and the crime’s social cost.” *Id.* (citing *Austin v. United States*, 509 U.S. 602, 621-22 (1993)).

107. *Grinberg*, 694 N.Y.S.2d at 328.

108. See *id.* at 327 (discussing the court’s analysis of the excessiveness tests).

Court indicates disfavor for such laws. Under current law, New York City's Property Clerk Forfeiture Act is constitutional under the Due Process, Takings, and Excessive Fines Clauses. The question that remains, however, is how far the Supreme Court will allow government entities to extend forfeiture laws before the Court decides that an individual's rights have been trampled. Currently, the government's forfeiture power extends to drunk driving offenses. Forfeiture has proven to be a very powerful tool in the fight against drugs and prostitution. Undoubtedly, if left unscathed by the courts, forfeiture will be an effective mechanism in the fight against drunk driving.